

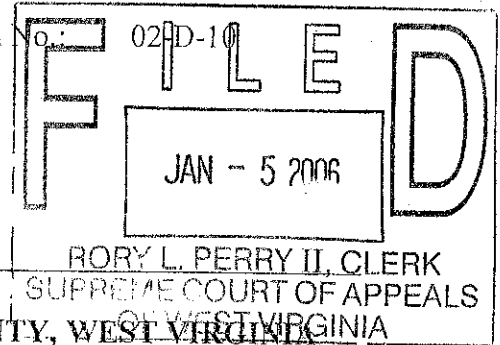
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

In Re the Marriage of:  
PATRICIA E. FITZGERALD,  
Petitioner,

and

EARL L. FITZGERALD,  
Respondent.

Civil Action No. 02-D-10



**FROM THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA**  
Case No.: 02-D-10

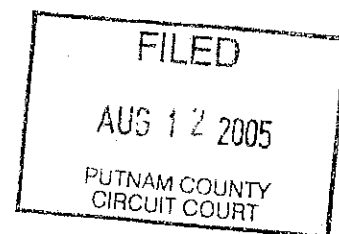
**PETITION FOR CERTIFIED QUESTION**

*TO THE HONORABLE JUSTICES OF THE  
WEST VIRGINIA SUPREME COURT OF APPEALS:*

The Petitioner/Respondent, Earl L. Fitzgerald, by counsel, Shawn D. Bayliss, presents this petition pursuant to Rules 3 and 13 of the Appellate Procedure of the West Virginia Supreme Court of Appeals. The Petitioner/Respondent seeks an answer and opinion with remand of the Order on Workers Compensation Benefits entered by the Family Court of Putnam County, West Virginia on March 30, 2004, classifying the Petitioner/Respondent's permanent total disability workers compensation award as martial property subject to equitable distribution. The Circuit Court of Putnam County subsequently approved the parties' Third Agreed Order Regarding the Classification and Distribution of Workers Compensation Benefits certifying four questions of first impression to the West Virginia Supreme Court of Appeals

TABLE OF AUTHORITIES

- Petties v. Petties, 129 S.W. 3rd 901 (March 30, 2004)
- Winslow v. Winslow, 14 S.W. 3rd 690
- Davis v. Davis, 2004 OK CIV APP 30, 87 P. 2d. 640 (April 4, 2004)
- Hartzell v. Hartzell, 90 Ohio App. 3rd 385 (1993) and Easton v. Easton, Court of Appeals of Ohio, Case No. 2003-G-2502 (March 5, 2004)
- Beckley v. Beckley, 790 N.E. 2d 1033 (July 1, 2003)
- Holman v. Holman, 84 S.W. 3rd 903 (2002)
- White v. White, 820 So. 2d 432 (July 3, 2002)
- Pudlish v. Pudlish, 796 A. 2d 346 (2002)
- Collins v. Collins, 347 Ark 240 (2001)
- Doucette v. Washburn, 2001 ME 38, 766 A.2d. 578 (2001)
- Buetow v. Buetow, 27 Kan App 2d. 610 (2000)
- Lowery v. Lowery, 113 Md App 423 (1997)
- Hall v. Hall, 278 Ill App 3rd 782 (1996)
- Rodriquez v. Rodriquez, 1995 Ct supp 2539 (1995)
- McDonald v. McDonald, 52 Cal App 3rd. 509 (1975)
- West Virginia Code* § 23-2-6.



*West Virginia Code* § 23-4-6.

*Hardy v. Hardy*, 413 S.E.2d 151(W.Va.1991).

*West Virginia Code* §48-1-223, as follows:

Bartram v Bartram (1991, Ohio App, Medina Co) 1991 Ohio App LEXIS 4702,  
appeal after remand (Ohio App, Medina Co) 1992 Ohio App LEXIS 5896.

RC § 3105.171(3)(a)

RC § 3105.171(A)(6)(a)(vi),

RC § 4123.54,

*Conrad v. Conrad*, 612 S.E.2d (W.Va. 2005)

### **KIND OF PROCEEDING AND NATURE OF THE RULING IN THE FAMILY COURT**

The Petitioner/Respondent, Earl L. Fitzgerald, suffered a permanently disabling injury during the course of the parties' marriage. That by a decision of the Workers' Compensation Division rendered on October 25, 2002, the Petitioner/Respondent, Earl L. Fitzgerald was awarded permanent total disability retroactive to December 1, 1992. Petitioner/Respondent received payments of \$90,654.27 during the period of the marriage. He later received \$106,406.62 as a back award, covering the period December 1, 1992 through October 24, 2001, a period during which the parties were married and still living together. The Family Court found that the Petitioner/Respondent, Earl L. Fitzgerald was entitled to twenty five percent (25%) of the cumulative sum of both awards for his pain and suffering. This amount was deducted from the portion of the permanent total disability award that he received after the parties separated. The remaining balance of said post-separation award the Court classified as a marital asset subject to equitable distribution, and accordingly equally divided the same between the parties.

### **CASE HISTORY AND STATEMENT OF FACTS**

The essential facts regarding the determination of "marital v. separate property" as regards Petitioner/Respondent, Earl L. Fitzgerald's workers' compensation permanent total disability award are uncontroverted. Earl L. Fitzgerald and Patricia E. Fitzgerald, were married on May 28, 1989 and separated on January 4, 2002. That during the course of the parties' marriage, the Petitioner/Respondent, Earl L. Fitzgerald, was injured on the job. That by a decision of the Workers' Compensation Division rendered on October 25, 2002, the Petitioner/Respondent, Earl L. Fitzgerald was awarded a permanent total disability award retroactive to December 1, 1992. Petitioner/Respondent, Earl L. Fitzgerald, received payments totaling \$90,654.27 during prior to the parties' separation and filing for divorce. After the parties separated and divorced,

Petitioner/Respondent later received the additional sum of \$106,406.62 as a back award, covering the period December 1, 1992 through October 24, 2001.

### QUESTIONS AND COURT RESPONSE

QUESTION NO. 1: What portion, if any, of a lump sum Worker's Compensation permanent total disability award is considered a marital asset?

COURT'S RESPONSE: The Court FINDS that any portion of a lump sum Workers' Compensation permanent total disability award that represents payments that should have been received during the period of the parties' marriage are considered a marital asset.

QUESTION NO. 2: If so, what portion, if any, of a lump sum Worker's Compensation permanent total disability award should be considered an award for pain and suffering?

COURT'S RESPONSE: The Circuit Court adopts the analysis of the Family Court and FINDS that the 25% of the Workers' Compensation award for pain and suffering is the injured spouse's separate property.

QUESTION NO. 3: How should the family court, and upon review the circuit court, distribute that portion, if any, of a lump sum Worker's Compensation permanent total disability award that is considered marital property?

COURT'S RESPONSE: The Court FINDS that the remaining lump sum Workers' Compensation permanent total disability award would then be subject to equitable distribution as any other marital asset.

QUESTION NO. 4: Is the injured spouse entitled to any reimbursement of part of a lump sum Worker's Compensation permanent total disability award that was received prior the parties' separation?

COURTS RESPONSE: The Court FINDS that the injured spouse is not entitled to any reimbursement unless there is a showing that this lump sum payment has been kept in some segregated account and was not consumed during the marriage. The Court FINDS that the portion of a Workers' Compensation permanent total disability award that was received prior to the parties' separation would have been consumed by the parties during the marriage and the injured spouse is not entitled to be reimbursed his 25% by the non-injured spouse.

### STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals set for the standard for reviewing a finding of the Family Court adopted by the Circuit Court in syllabus point two of Lucas v. Lucas, 215 W.Va. 1, 592 S.E.2d 646 (2003), as follows:

In reviewing challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

The questions certified by the Circuit Court of Putnam County regarding the issue of whether a Workers' Compensation award constitutes marital property subject to equitable distribution or whether it is the sole and separate property of an injured spouse, is a case of first impression in West Virginia.

### ARGUMENT AND DISCUSSION OF LAW

The essential facts regarding the determination of "marital v. separate" as regards Mr. Fitzgerald's PTD award are uncontroverted - the parties were married on May 28, 1989, separated on January 4, 2002, and by decision dated October 25, 2002 Mr. Fitzgerald was granted a PTD award with a beginning date of December 1, 1992.

Whether a Workers' Compensation award constitutes marital property subject to

equitable distribution or whether it is the sole and separate property of an injured spouse is a case of first impression in West Virginia.

The various state court's have taken a wide a varied approach to the classification of such an award as follows: the "mechanistic" approach, wherein the Court finds that workers' compensation awards acquired during marriage; the "unitary" approach, wherein the award is considered to be uniquely personal to the injured spouse, and thus is his/her sole and separate property; and, "analytical" approach, wherein a workers' compensation award is determined to be marital property to the extent that it compensates for the loss of income during the marriage. Most importantly however, any portion of such an award that is compensation for post separation/divorce earnings are considered separate property.

The "analytic" approach, as referenced in the Family Court's Order, is to look at the nature of the underlying loss when classifying a workers' compensation award. Twenty-Seven (27) states have adopted this approach to classifying and distributing workers' compensation awards. Portions of said award that are to compensate for lost wages during the course of a marriage are considered marital property. Those portions which are to compensate for premarital or post separation wages are considered separate property. However, this approach fails to consider the obligatory pain and suffering damages that the injured party endured that is not compensated for by such an award.

A brief review of representative case decisions from other jurisdictions follows.

MISSOURI - Petties v. Petties, 129 S.W. 3rd 901 (March 30, 2004) holds that to the extent a WC award compensates for earnings lost during the marriage, that portion of the award is marital property; conversely, if the award or a portion thereof is for future earnings that would have occurred after dissolution of the marriage, then that portion of the award is not a marital asset. see also Winslow v. Winslow, 14 S.W. 3rd 690

OKLAHOMA - Davis v. Davis, 2004 OK CIV APP 30, 87 P. 2d. 640 (April 4, 2004)

employs the "replacement" approach - if an award is to replace wages earned during the marriage, the proceeds of the award are marital property, otherwise they are not.

OHIO - Hartzell v. Hartzell, 90 Ohio App. 3d 385 (1993) and Easton v. Easton, Court of Appeals of Ohio, Case No. 2003-G-2502 (March 5, 2004) - says that WC benefits that compensate for loss of earnings during marriage are marital property. Benefits that compensate for loss of a body part or for the loss of future earning capacity are not marital property.

INDIANA - says that WC benefits compensating a party for future income are not marital property, Beckley v. Beckley, 790 N.E. 2d 1033 (July 1, 2003), Attached Exhibit 1 (please note review of other jurisdictions on page 4 of exhibit)

KENTUCKY - Holman v. Holman, 84 S.W. 3d 903 (2002) - Husband, a fireman, received a disability retirement after 13 years as a fireman, then divorced several years later. The court ruled that his post-divorce disability retirement benefits were not marital property.

FLORIDA - White v. White, 820 So. 2d 432 (July 3, 2002) - citing Weisfield v. Weisfield the Florida court held that only that portion of damages paid to the injured spouse as compensation for past lost wages and loss of earning capacity is to be considered marital property. Damages for future loss of earning capacity and future medical expenses are the separate property of the injured spouse. (Attached Exhibit 2)

PENNSYLVANIA - Pudlish v. Pudlish, 796 A. 2d 346 (2002) - emphasized the "date of award" in determining nature of Workers comp contested claim - held that in a contested claim, since the "right to receive" the award did not vest until the date of the award, if the award date is after the separation, the award is not marital property. (Attached Exhibit 3, at page 4 of exhibit).

ARKANSAS - Collins v. Collins, 347 Ark 240 (2001) - sets up a 2-pronged test for exclusion of disability benefits from marital property: 1) claim must be for a degree of permanent disability, and 2) the injury must be sustained while on the job or as a result of a tortious act.

MAINE - Doucette v. Washburn, 2001 ME 38, 766 A.2d. 578 (2001) - holds that the "wage replacement" portion of an award is marital property, while portion for pain and suffering is not marital property. (Attached Exhibit 4)

KANSAS - Buetow v. Buetow, 27 Kan App 2d. 610 (2000) - says a FbLA<sup>2</sup> award for post-divorce lost earnings or lost earning potential are not marital property, but the portion for past wages and medical expenses are marital property. (Attached Exhibit 5)

MARYLAND - Lowery v. Lowery, 113 Md App 423 (1997) holds that the portion of a Workers Comp settlement that provides compensation for lost wages or future earning capacity constitutes marital property.

~~ILLINOIS - Hall v. Hall, 278 Ill App 3d 782 (1996) - holds that a Workers comp claim~~



which arose during the marriage is marital property even if settled after the divorce. Uses date of injury as operative date. (Attached Exhibit 6)

CONNECTICUT - Rodriguez v. Rodriguez, 1995 Ct supp 2539 (1995) - holds that Workers comp benefits for "non-wage-loss aspects" of Workers comp disability payments are not immune from marital property distribution (Attached Exhibit 7)

CALIFORNIA - McDonald v. McDonald, 52 Cal App 3rd. 509 (1975) holds that a Workers comp lump sum award pursuant to a settlement agreement received by an injured spouse after a marital separation was the separate property of the injured spouse. This is cited as authoritative in the recent case of Raphael V. Bloomfield, 113 Cal. App. 4th 617 (2003) (Attached Exhibit 8)

West Virginia Workers' Compensation Act substitutes the right of an injured employee to bring a cause of action against a negligent employer. This remedy of compensation is an exclusive remedy. *West Virginia Code* § 23-2-6. Makarenko v. Scott, 132 W.Va. 430, 55 S.E.2d 88 (1949). This provision has been consistently construed as relieving the employer from common law liability for negligent injury or the death of an employee. See McVey v. Chesapeake & Potomac Telephone, Co., 103 W.Va. 519, 138 S.E. 97 (1927). As such, the Workers' Compensation award becomes the only remedy that an injured worker has available to him/her for pain, suffering, aggravation annoyance, inconvenience etc.

*West Virginia Code* § 23-4-6. Classification of and criteria for disability benefits, states in pertinent part that:

Where compensation is due an employee under the provisions of this chapter for **personal injury** (emphasis added), the compensation shall be as provided in the following schedule:

(a) The terms "average weekly wage earnings, wherever earned, of the injured employee, at the date of injury" and "average weekly wage in West Virginia", as used in this chapter, have the meaning and shall be computed as set forth in section fourteen of this article except for the purpose of computing temporary total disability benefits for part-time employees pursuant to the provisions of section six-d of this article.

(b) For all awards made on and after the effective date of the amendment and reenactment of this section during the year two thousand three, if the injury causes temporary total disability, the employee shall receive during the continuance of the disability a maximum

tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this state, except that marital property does not include separate property as defined in section 1-238 [§ 48-1-238]; and

(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from: (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property; or (B) work performed by either or both of the parties during the marriage.

West Virginia Code § 48-7-101 (2001) (Repl. Vol. 2004) sets forth the procedure that the Family Court must follow in classifying and distributing the property and assets of the parties in a divorce action, as follows:

"Except as otherwise provided in this section, upon every judgment of annulment, divorce or separation, the court shall divide the marital property of the parties equally between the parties."

The Supreme Court of Appeals addressed the characterization and distribution of a personal injury award in the *Hardy v. Hardy*, 413 S.E.2d 151 (W.Va. 1991). In *Hardy* the Court adopted the analytical approach to the characterization and distribution of a personal injury award and stated in syllabus point 1:

1. To the extent that its purpose is to compensate an individual for pain, suffering, disability, disfigurement, or other debilitation of the mind or body, a personal injury award constitutes the separate nonmarital property of an injured spouse.

This Court went on to state that "Economic losses, such as past wages and medical expenses, which diminish the marital estate are distributable as marital property when recovered in a personal injury award or settlement." Syllabus Point 2, *Hardy v. Hardy*, 186 W.Va. 496, 413 S.E.2d 151 (1991).

The question turns to what extent, if any, a permanent total disability award is economic loss or replacement earnings for the injured spouse.

An individual's earnings in which their partner may have an equitable interest are defined in *West Virginia Code* §48-1-223, as follows:

"Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program. "Disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

Mr. Fitzgerald's workers' compensation permanent total disability award is not broken down into categories such as replacement of wages, pain and suffering or prospective earnings. It is not earnings as defined above, nor is it an economic loss. Rather, a permanent total disability award is best defined as injury compensation for the pain suffering disfigurement of the injured spouse. Accordingly, such a permanent total disability award would be the injured spouse's sole and separate property.

An analysis that is closely on point is set forth in the matter of *Bartram v Bartram* (1991, Ohio App, Medina Co) 1991 Ohio App LEXIS 4702, appeal after remand (Ohio App, Medina Co) 1992 Ohio App LEXIS 5896. In this case, the court analyzed a workers' compensation award to determine if the lower court had correctly classified it as the wife's separate property. Similarly to Mr. Fitzgerald, she was injured during the course of her employment and received a lump-sum workers' compensation award and a biweekly sum for her work-related injuries. At a hearing for divorce, the referee recommended an equal division of the workers' compensation award. The trial court modified the referee's decision, finding the wife's award to be her separate property which was deducted from the marital estate. The husband appealed, contending that under RC § 3105.171(3)(a), the award was marital property. The Ohio appeals court disagreed, citing the definition of separate property, RC § 3105.171(A)(6)(a)(vi), as including compensation

for personal injury except to the extent that it replaces lost earnings during the marriage or marital assets.

The Ohio court then examined the nature of workers' compensation benefits, as found at RC § 4123.54, to determine if they fit into this definition, and found that such benefits did. Pursuant to the Ohio Workers' Compensation Act, the workers' compensation claim is the injured employee's recourse for personal injury against an employer. The Ohio court found, that the award was analogous to compensation for personal injury, which is usually separate property pursuant to the equitable distribution statute, except to the extent it compensates the marital estate.

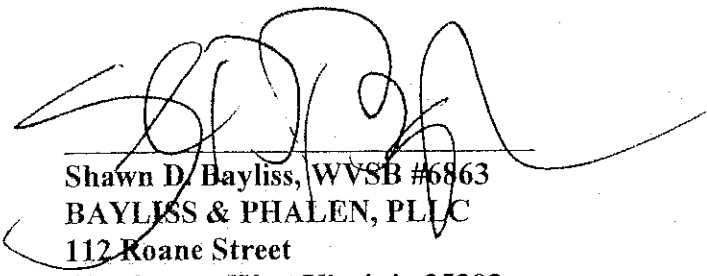
In the matter of *Conrad v. Conrad*, 612 S.E.2d (W.Va. 2005), this Court in a per curium opinion, determined that a long-term disability policy would be treated as marital property for purposes of equitable distribution. The Fitzgerald matter is distinguishable for the above stated reasons and that a workers' compensation award is a replacement for a worker's personal injury claim, is not an insurance policy purchased by the parties with marital funds and potentially includes prospective earnings that would come due after the parties separation.

Mrs. Fitzgerald, or moreover, any marriage partner is not entitled to share in the regular employment earnings of their partner after their date of separation, as all such earnings are that persons sole and separate property. As such, if the Court determines that if any portion of Mr. Fitzgerald's award is marital, the Court must also determine what portion is for prospective earnings that would be his separate property as defined in *West Virginia Code* § 48-1-237 or excluded from consideration by *West Virginia Code* § 48-1-237.

**PRAYER FOR RELIEF**

Petitioner/Respondent, Earl L. Fitzgerald, respectfully requests this Court to enter an Order answering the certified questions herein, reversing the ruling of the lower court, that his workers' compensation permanent total disability award be classified as his sole and separate property and that this matter be remanded to the Circuit Court of Putnam County, West Virginia with instruction for further hearing on all issues so triable herein.

**EARL L. FITZGERALD**  
By Counsel



**Shawn D. Bayliss, WVSB #6863**  
**BAYLISS & PHALEN, PLLC**  
**112 Roane Street**  
**Charleston, West Virginia 25302**  
**Telephone: (304) 342-3850**  
**Counsel for Petitioner/Respondent**

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SUPREME COURT OF APPEALS OF WEST VIRGINIA  
DOCKETING STATEMENT

Style:

In Re the Marriage of:

PATRICIA E. FITZGERALD,  
Petitioner,

and

EARL L. FITZGERALD,  
Respondent.

Civil Action No.: 02-D-10

Type of Action

(x) Civil

( ) Criminal

Circuit: 29<sup>th</sup>

County: Putnam

Judge: N. Edward Eagloski

Case Numbers: 02-D-10

FILED IN CLERK'S OFFICE  
PUTNAM COUNTY

2005 AUG -3 AM 10:57

A. TIMELINESS OF APPEAL

1. Date of entry of judgment or order appealed from: April 28, 2005.
2. Filing date of any post-judgment motion filed by any party pursuant to N/A.
3. Date of entry of order deciding post-judgment motion: N/A.
4. Date of filing of petition for appeal: July 30, 2005.
5. Date of entry of order extending appeal period: June , 2005.
6. Time extended to: July 30, 2005.

B. FINALITY OF ORDER OR JUDGMENT

1. Is the order or judgment appealed from a final decision on the merits as to all issues and parties? Yes \_\_\_ No X

2. If no, was the order or judgment entered pursuant to  
Yes \_\_\_ No \_\_\_ (N/A)

3. Has the defendant been convicted? (N/A) X Yes \_\_\_ No \_\_\_

4. Has a sentence been imposed? (N/A) X Yes \_\_\_ No \_\_\_

5. Is the defendant incarcerated? (N/A) X Yes \_\_\_ No \_\_\_

C. Has this cause previously been appealed? Yes \_\_\_ No X  
If yes, give the case name, docket number, and disposition of each prior appeal on a separate sheet.

D. Are there any related cases currently pending in the Supreme Court of Appeals or Circuit Court? Yes \_\_\_ No X  
If yes, cite the case and the manner in which it is related on a separate sheet.

E. State the nature of the suit, the relief sought, and the outcome below.  
[Attach an additional sheet, if necessary]

Family Law: Certified Questions regarding the classification and distribution of a Workers' Compensation Permanent Total Disability Award.

Petitioner/Respondent seeks and answer to said certified questions and remand to the Family Court of Putnam County, with directions that the Order classifying any portion of his Workers' Compensation permanent total disability award as marital property subject to equitable distribution be vacated and that he be granted the exclusive ownership of the entire award as his sole and separate property..

F. Certified Questions raised on appeal.

QUESTION NO. 1: What portion, if any, of a lump sum Worker's Compensation permanent total disability award is considered a marital asset?

QUESTION NO. 2: If so, what portion, if any, of a lump sum Worker's Compensation permanent total disability award should be considered an award for pain and suffering?

**QUESTION NO. 3:** How should the family court, and upon review the circuit court, distribute that portion, if any, of a lump sum Worker's Compensation permanent total disability award that is considered marital property?

**QUESTION NO. 4:** Is the injured spouse entitled to any reimbursement of part of a lump sum Worker's Compensation permanent total disability award that was received prior the parties' separation?

G. Do you wish to make an oral presentation of the petition?  
Yes X No       

H. Has the entire or only portions of the record been designated?  
Entire        Portion X

I. If the appeal is granted, do you desire reproduction of the record of that the case be heard on the original record?  
Reproduce        Original X

J. List each adverse party to the appeal. Attach additional sheets if necessary. If no attorney, give address and telephone number of the adverse party.

1. Adverse party: Beverly S. Selby, Esquire  
1200 Kanawha Boulevard Tower  
1018 Kanawha Boulevard, East  
Charleston, West Virginia 25301  
(304) 342-0411

K. Petitioner(s) name: Earl L. Fitzgerald  
If incarcerated, give institutional address  
Address 175 Hale Street, Hurricane, West Virginia 25526  
Telephone (304) 562-2628

L. 1. Attorney or pro se litigant filing Docketing Statement. Will you be handling the appeal? (In criminal cases, counsel below will handle the appeal unless received by the court.)  
Yes (X) No ( )

Name: Shawn D. Bayliss  
Address: 112 Roane Street, Charleston, West Virginia 25302  
Phone: (304) 342-3850  
Counsel for: Earl L. Fitzgerald



If this is a joint statement by multiple petitioners, add the names and addresses of the other petitioners and counsel joining in this Docketing Statement on an additional sheet, accompanied by a certification that all petitioners concur in this filing.

Signature

Shawn D. Bayliss

Date:

July 29, 2005